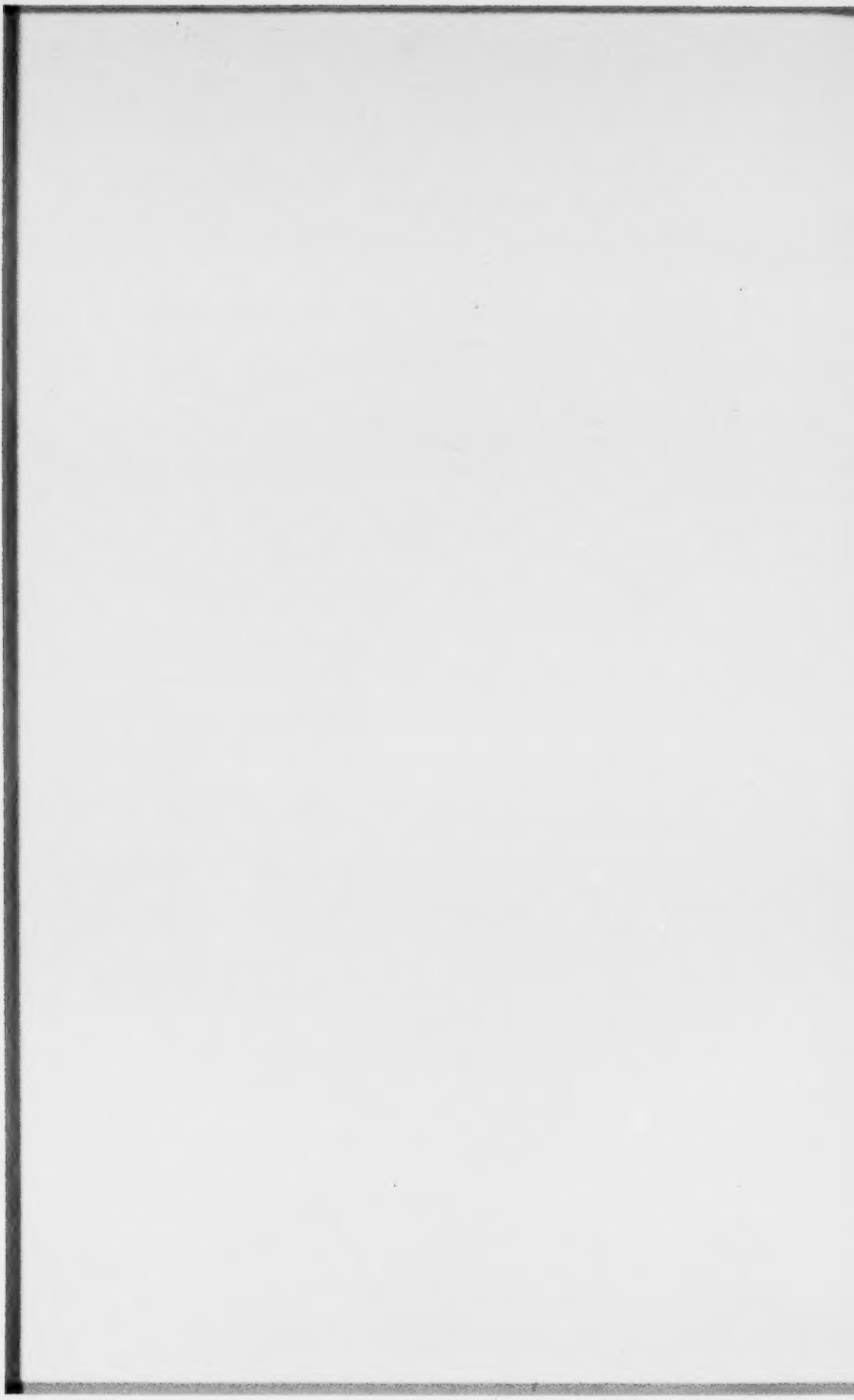

No. 9504

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

J. H. HEMLER,
Plaintiff, and Appellant,

versus

HOPE PRODUCING CO.,
Defendant and Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

ORIGINAL BRIEF OF J. H. HEMLER, APPELLANT.

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Appellant is lessor in an oil and gas lease, under which appellee, as lessee, produced much gas. Appellant here claims additional royalty on the gas produced.

This is one of several suits having the same issues, filed by land-owners in the Richland gas field, three of which suits are now before this Court.

The lease sued on stipulates that appellant, as lessor, shall receive one-eighth of the market price of the gas produced. Under this, appellee paid appellant royalty on the basis of 3c per thousand cubic feet. For brevity we will hereinafter abbreviate "thousand cubic feet" to "MCF".

In this suit, appellant claims that the market price was much more than 3c, and sues for the excess.

On the trial of this case, plaintiff proved that defendant was a large producer of gas in the Richland gas field, and sold all its gas at delivery points within the field, for 4c to 6c per MCF; that its average sale price was 4.832c per MCF; that all the other large producers sold for the same price, the sales being to pipe lines within the field; and that the market for natural gas is and always must be long term contracts with pipe lines, as gas cannot be marketed any other way.

Appellant also claimed in his petition that appellee had extracted and sold much gasoline from the gas produced, and appellant claimed $4626.56 for ⅛ royalty on this gasoline. However, the District Court struck out this claim from appellant's petition, in limine.

Appellee, in the trial, introduced in evidence several contracts, which we think inadmissible, to show sales of a small quantity of gas, a little at the wells, for less than the above figures; and testimony purporting to show that appellee incurred some expenses in carrying out its contracts for sale of gas to pipe lines shown in appellant's evidence. Appellee then introduced in evidence a bulky document consisting of extracts from over 900 oil and gas leases, widely scattered in time and location, wherein lessor agreed that his royalty would be paid as ⅛ of 3c per MCF produced.

Appellee also introduced in evidence, the opinion of several witnesses that 3c was the correct market price; and a statement purporting to show the cost of transportation of gas from the wells to the pipe line delivery points, consisting of extracts from its books, plus various opinions, and guesses by its book-keeper, there being no accurate figures in appellee's books as to what this cost of transportation was. Appellant objected to all of the above evidence, and pleads it as reversible error, as will be hereinafter shown.

Appellant also objects to much of the District Judge's charge to the jury, as will be hereinafter shown, especially that part of the charge which instructed the jury that if they found sales of gas at any of the wells in the field, they should disregard the pipe line prices covering 94% of the total gas produced, which appellant had proved, and use only the sales at well to determine the market price due to appellant.

The jury brought in verdict for defendant on the merits. Hence the various pleas of estoppel, accord, etc., filed by defendant are not now at issue, and may be disregarded here.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to hold that the market price of gas, to which appellant is entitled under the lease sued on, is the price in actual sales of gas within the Richland gas field.

2. The District Court erred in admitting in evidence to prove the market price to which appellant is entitled, any evidence except the price in actual sales of gas within the

Richland gas field, especially leases and the opinion of witnesses.

3. The District Court erred in admitting in evidence contracts for sale of gas contrary to the rulings of this Court.

4. The District Court erred in permitting cross-examination of appellant's witness, N. C. McGowen, on subjects not mentioned in the direct examination.

5. The District Court erred in permitting oral testimony of the contents of written contracts, especially as the contracts themselves had been ruled inadmissible by this Court.

6. The District Court erred in permitting evidence of the operating expenses of appellee, since the costs of operation are irrelevant to the market price of sales.

7. The District Court erred in holding that under the lease contract sued on, appellee was not required to bear all the expense of producing and marketing the gas, as consideration for the 7/8 of the product of the wells granted to appellee as lessee in the lease.

8. The District Court erred in failing to hold that under the lease sued on, stipulating that the royalty is ⅛ of the market price, the market contemplated by the parties was the market price of sales in the field.

9. The District Court erred in failing to hold that any ambiguity or uncertainty in the lease is to be construed strongly in favor of appellant as lessor.

10. The District Court erred in holding that there was one market price at the well, and another, larger, market price at other points in the Richland gas field, the fact being that there was only one market price for gas within the Richland field.

11. The District Court erred in holding that appellee was entitled to deduct from the market price in the field, the cost of transporting gas from the well to the delivery point within the field.

12. The District Court erred in permitting defendant to introduce in evidence its exhibit marked "D-26", or any evidence regarding it, because the evidence showed this statement to be false and untrue, and not a copy of any books or records, but merely a guess by appellee's bookkeeper who was not familiar with the practical operations in the field.

13. The District Court erred in permitting evidence of the cost of appellee's field operations by an employee not familiar with or expert in such operations.

14. The District Court erred in admitting in evidence, bulletins of the United States Department of Commerce, showing general prices covering all of Louisiana.

15. The District Court erred in striking from appellant's petition, all claims for royalty on gasoline produced from the well sued on, and denying to appellant any royalty on such gasoline.

16. The District Court erred in its charge to the jury, as follows:

(a). In charging the jury that they were not to take into consideration, in deciding this case, any of the sales to pipe-lines which constitute 94% of the total gas produced, unless they first found that there were no sales at the well, because the Court should have charged that the jury must take into consideration all sales of gas for delivery within the Richland gas field.

(b). In charging the jury that appellee is entitled to deduct from the prices received from its pipe line sales, the expense of getting the gas from the wells to the delivery points to the pipe lines within the Richland gas field, this being error because this is part of the expense to be borne by appellee, as lessee, in consideration of receiving 7/8 of the gas produced, and for the further reason that this cost being peculiarly within the knowledge of appellee, it was obliged to prove with reasonable certainty what this cost was, which appellee failed to do.

(c). In failing to give appellant's requested special charges No. 2, 3, 4, 5 and 7, and in giving appellee's requested charges No. 5 and 6.

17. The District Court erred in failing to hold that this being a suit to enforce a written contract of lease, the Court will ascertain and enforce the agreement contemplated by the parties.

18. The District Court erred in failing to hold that the market price contemplated by the parties to the lease sued on, was the price received by lessee and other producers, in any and all sales made in the field, with no deductions.

ARGUMENT

Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time.

In each of these cases, the same narrow issue is presented, namely, what is the market price of natural gas in the Richland gas field, in Richland Parish, State of Louisiana.

Obviously, the market price of gas, or anything else, is what it sells for. There can be no price without a sale. There might be situations where there were no genuine sales from which market price could be determined; but in the case at bar, very many sales, of all the gas in the field, each admitted to be genuine, are in evidence. Hence it seems self-evident that all there is to determining the market price of gas, the issue in this and other cases, is to submit to the jury the various sales, and let the jury decide what is a fair average of the prices.

Yet on this simple issue, so simply and easily decided, the District Court and this Court have spent almost ten years of active litigation, without deciding the issue. Surely there must be something wrong with the procedure, when so protracted litigation is required for such a simple issue.

The key to the prolongation of this litigation is to be found in the old adage, well known as a practical guide to lawyers for winning lawsuits:

"If the facts and the law are against you, confuse the issues and muddy the waters."

In this case, as well as in the other similar cases, the very able and resourceful attorneys for the gas companies, were confronted with the inescapable fact that almost all of the sales of gas were at a price almost twice what the gas companies had paid to their lessors, hence simply laying the facts before the jury would result in a big verdict for plaintiffs. To avoid such a deplorable result, they have done a masterly job of confusing the issues and "muddying the waters."

The methods used by them for confusing the issues fall into five classes:

1st. Introduce in evidence an immense mass of leases, in which other land-owners, anywhere, at any time, leased their lands for oil and gas development, in leases stipulating that if oil and gas were found, the royalty would be ⅛ of 3c per MCF. No explanation has ever been made, in this or any other case, of what relevancy such leases have to the issue of market price of gas actually produced and sold.

2nd. Introduce in evidence testimony of gas company officials that there is some cost to producing gas to sell to the pipe lines. No explanation is ever made of why, when sales have actually been made at fixed prices, the fact that the price of the sale is not 100% profit, has any bearing on the issue.

3rd. Have the gas company officials and their satellites give a solemn opinion that 3c is the market price of gas. No explanation is ever made of why a defendant should be allowed to testify its opinion as to what the jury should decide.

4th. Strongly assert that there are two market prices, one at the wells in the field, the other, much higher, "in the field," carefully avoiding any explanation of how it is possible, when a gas field consists only of an area thickly studded with wells, that there be one market price at the wells and another market price, nearly double, in the field within a hundred feet of the wells.

5th. File in evidence and testify at length to a complicated, confused conglomeration of figures which no one can explain or understand, purporting to show the cost of transporting gas from the well to the delivery point of the pipe lines, within the field.

In the case at bar, the District Court permitted appellee to confuse the issues by all these means. We contend that by this confusion, and the erroneous charge to the jury, the District Court so confused the jury that it could not bring in a correct verdict. This we will endeavor to show in detail.

Our brief will discuss in order the following points:

1. Market Price can be proved only by sales.

2. The intent of the parties to the lease sued on was that the sales in the field should determine the royalty to be paid.

3. The sales in the field show that appellee is entitled to almost 5c per MCF as royalty.

4. Leases were erroneously admitted in evidence.

5. Opinions were erroneously admitted in evidence.

6. Operating costs of producers were erroneously admitted in evidence.

7. There is only one market price, that for the field, and appellant is entitled to that price.

8. Appellee's purported statement of costs of operating pipe lines was erroneously admitted in evidence.

9. Appellant's claim for royalty on gasoline was erroneously stricken.

1.

Market Price Can Be Proved Only By Sales.

The lease sued on stipulates that appellant shall receive as royalty, 1/8 of the market price of the gas produced (Tr. 23).

The Supreme Court of the United States defined "Market Price" in the case of *Muser v. Magone, 155 U. S. 240, 249*, as follows:

> "such price as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

Your Honors considered this question in the case of *Sartor v. United Gas P. S. Co., 84 F. (2d) 436, 440*, and there agreed with us that sales must be used to determine price, but in that case took the position that plaintiff must prove a day-to-day price, a daily posting of prices.

In that holding, your Honors evidently took it for granted that the market for gas is of the same nature as

the market for oil. In that case, plaintiff failed to show anything to the contrary.

In this case now at bar, plaintiff has met this ruling in the previous case, by offering in evidence complete new proof of what the market for natural gas actually is.

To prove this, we were forced to call as our witness, Mr. N. C. McGowen, who was a hostile witness because his company is defendant in a similar suit, No. 9493 now before this Court. We ask the Court to read his very illuminating testimony, condensed at Transcript pages 60-62 (Tr. 60-62). His testimony is:

1. The market for natural gas is entirely different from the market for oil, because oil can be stored above ground, but gas cannot be so stored; and oil can be, and frequently is, transported from the well to the market by railroad cars or automobile trucks, but gas can be transported from the field where produced, to the market where used, by pipe lines.

2. Pipe lines are costly.

3. No one will build a pipe line to market gas, unless he has, in advance of construction, contracts with sufficient producers to insure a supply of gas, to be delivered over a long term of years, sufficient to repay the cost of the pipe and a profit.

4. Hence there cannot ever be for gas a day-to-day, changing market, or posted prices, as in the case of oil, but the only possible market for gas is a long term market, that is, a market in which gas is sold by contract to deliver over a long period of years at a fixed price. That fixed price in

the long term contracts is the market price and the only market price.

This testimony shows that your Honors were correct in the rulings in the previous case except on one point. Where your Honors require proof of a day-to-day market, that is the correct market for oil but not for gas.

2.

Intentions of the Parties to the Lease.

This being a suit on contract, the object of the Court is to ascertain and enforce the intent of the parties.

It seems self-evident that lessor contemplated, in signing this lease, that the market price he would receive, would be the price of whatever sales were made, by his lessee, or possibly by all producers, in the field.

However, on this point we have clear and undisputable evidence. Mr. McGowen testified as an expert (Tr. 61), that any reasonable man would contemplate that the market for natural gas would be a market in which the supply and price were fixed by contract over a period of years, and not from day to day, and on page 62, testifies:

> "The physical characteristics of the gas business demand that any reasonable man making any kind of a contract regarding a market for gas in the Richland gas field in or about the year 1926, would not seriously contemplate a market where he had to sell his gas from day to day to Tom, Dick and Harry, but would contemplate a market at a fixed price with maximum and minimum deliveries over a fixed period of time. A

characteristic of the gas business is that it must be conducted in that manner, and not on a posted daily price such as is done in the oil business. The situation in the gas business is different from that which obtains in the oil business. It isn't a varying market."

Thus we have proved by clear, undisputed, and eminently reasonable and understandable evidence, that the market price of gas contemplated by the parties to this lease was simply and entirely, the sales to the pipe lines, modified slightly by the small sales for carbon black.

We respectfully suggest that this case should be remanded to the trial court to lay before a jury exactly this evidence, without any irrelevant confusion.

We ask the Court to note that this makes a simple, easily operated rule, and one which eliminates all this uncertainty and confusion of purpose which has kept this issue in Court for ten years.

3.

Proof of Sales.

Your Honors ruled in the case of *Sartor v. Arkansas Natural Gas Co., 78 F. (2d) 924*, that the contracts of sale of gas could not be put in evidence. This was reiterated by this Court in the case of *Sartor v. United Gas P. S. Co., 84 F. (2d) 436, 438*, in which last case, plaintiffs attempted a second time to introduce these contracts in evidence, which the District Court refused because of the first above case, plaintiff took Bill of Exceptions No. 22 to this ruling, and your Honors rejected this bill, holding that the District Court rightly refused to introduce these con' cts in evidence. *84 F (2d) 439.*

It being the settled jurisprudence of this Court that these contracts are inadmissible, appellant in the case at bar proved their prices by showing the exact sales made by appellee of all its gas sold within the Richland field during the period involved in this case (Tr. 204-208). This shows the sales made by appellee were from 4c to 6c per MCF, excluding a sale to a subsidia Interstate Natural Gas Co. Even with this "Wash" sale, the average price received by appellee was 4.832c per MCF (Tr. 72). We then showed (Tr. 62) that all the other producers sold to the pipe lines at the same price. We then showed (Tr. 197-198) that these producers were about 94% of the producers in the field, and that all the other sales combined were only 6.3% of the total production (Tr. 211).

Thus we showed that the sales which were contemplated by appellant as the market price he was to receive, were at least 4.832c per MCF instead of the 3c appellant received.

In its turn, appellee attempted to prove the prices in these little 6.3% of the total.

These sales were:

1. A sale by Alto Gas Co. to United Gas P. S. Co., (Tr. 258), which was for 3c because the Alto Gas Co. could not sell direct to the pipe lines, because they had contracted to buy only from the big producers, and so Alto Gas Co. had to sell to a big producer and let it resell to the pipe line at a big profit (Tr. 70).

2. A trivial sale from a big producer to D. H. Goodwin, evidently to give some local people gas for local use in trivial amount (Tr. 283).

3. Two sales to carbon black plant which have so many diverse provisions, such as basing the price on future sales of carbon black, and giving the seller an interest in the plant of the buyer, that they are worthless as showing any price.

However, the vital point is that in each of the above cases, the District Court squarely defied your Honors rulings as above stated, and permitted the long, complicated, unintelligible contracts of sales themselves to be introduced in evidence, over appellant's strenuous objection (Tr. 82).

Thus the result is that these contracts showing a few trivial sales at a low price, were put into the record and offered to the jury in full, while the big contracts were not put before the jury. This was a gross discrimination against appellant, caused solely by the failure of the trial judge to compel appellee to observe your Honors ruling, as appellant did. This was reversible error, highly prejudicial to appellant.

4.

Leases erroneously admitted in Evidence.

In this brief we will now discuss each of the four means shown hereinabove by which appellee confused a simple issue of fact.

What hurt appellant more than anything, before the jury, was the immense mass of leases introduced in evidence by appellee as its exhibit 25 (Tr. 71). This is so bulky that by consent of counsel (Tr. 312) it is brought up and submitted to the Court in triplicate original. Three copies of this document, bulky enough so it will not be over-

looked, will be submitted to your Honors on the oral argument of this case.

By no stretch of the imagination can these leases be held to be pertinent to the issues in this case. The sole issue in this case is, what is the market price of gas. This can be proved only by sales. These leases are not sales of gas. The record shows many leases (Tr. 290-297). As every one knows, these are contracts by which a landowner, for a consideration, usually large, grants to an oil or gas producer the right to go on his land and drill for oil. This is the essense of the contract, a servitude of right to drill. As a minor, incidental clause, the lease stipulates that if lessee does drill and does find oil or gas, the lessor will receive a certain fixed royalty. This is certainly not a sale of oil or gas. In most leases, no oil or gas is ever found, and there is no evidence in the record that any oil or gas was ever found under any of these leases in the record. We challenge appellee to state any reason why these leases are pertinent.

To make it even worse, the period of time involved in this suit is 1930 to 1934, but most of these leases are dated about 1926, and almost all of them are dated long prior to the period of time involved in this suit. Also, by far the greater number of them, more than 75% of them, are not in the Richland gas field at all.

The use made by the able and forceful attorney for appellee of this prodigious weapon, was terrific. The District Judge charged the jury (Tr. 355) that if there was a market at the well, the jury must disregard the pipe line contracts. Counsel for appellee stood before the jury with this document (D-25) and turned the pages, ran his finger down the lines, and dramatically told the jury, "here are sales at 3c, 900 of them. You need pay no attention to the

pipe line sales, because these are sales at the well at 3c and the Judge says you must take these." Since the District Judge has permitted this in evidence, naturally the jury accepted this as correct. What a gross injustice to appellant.

To make it even stronger, the District Judge expressly charged the jury (Tr. 356) that they must take these leases into consideration in deciding whether or not there was a market at the well. It is difficult to see how a greater reversible error could be committed by a trial court.

Nowhere in this case or any other has any Court or lawyer made any explanation or statement as to why leases such as these are relevant to the issue of market price. We unhesitatingly say that no relevancy could be shown. We challenge opposing counsel to explain how these leases are relevant.

5.

Opinions.

The District Court, over appellant's objection, permitted appellee's witnesses McGowen (Tr. 68), Florsheim (Tr. 84), and McHenry (Tr. 85), and government bulletins (Tr. 87), to express opinion as to what was the market price of gas in the Richland field, all adverse to appellant. This was clearly error, as invading the province of the jury.

In *Bishop v. Wright, 221 Fed. 392, 394*, the Court said:

> "It is an elementary rule that when the Court or jury can make their own deductions, they should not be made by those testifying. In all cases, therefore, where it is possible to inform

> the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves, or described by others, such opinions and deductions shall not be received."

We also cite the 22 pages of citation of authority in *22 Corpus Juris 485 to 506*, to the effect that opinions are not admissible when the facts are before the jury.

Undoubtedly it was highly prejudicial to appellant to have all these witnesses express an opinion that 3c was the correct price.

6.

Operating Costs of Producers.

Despite the fact that your Honors have most emphatically ruled twice that the contracts by which gas was sold by the producers to the pipe lines are not admissible in evidence, the District Court permitted Mr. McGowen to testify, orally, to the details of these contracts, over appellant's strenuous objections, and to swear that certain details of these contracts cost the producers to fulfill. His testimony is shown twice in the transcript, once, condensed by appellant (Tr. 63-68) then, ignoring appellant's condensation, appellee ordered the verbatim record of the same testimony to be inserted in the record (Tr. 89-124). This is a clear example of the way appellee confuses and encumbers this record.

The admission of this testimony is reversible error for three reasons:

(a) Mr. McGowen was appellant's witness, although hostile to appellant, and the cross-examination went beyond the direct.

(b) The testimony was oral testimony as to the contents of written documents not in the record and forbidden by this Court to go into the record.

(c) What it cost appellee to do business was irrelevant and immaterial, since appellant was not appellee's partner and had no interest in appellee's profit, losses, or expenses.

A.

Appellant put Mr. McGowen on the witness stand solely to show what was the market for gas. Appellant did not directly or indirectly ask him about prices or costs. Hence this examination went far beyond the direct, which is error. *Houghton v. Jones, 1 Wall. 702, 706.*

B.

It is difficult to imagine a more glaring disregard of the most elementary rule of evidence, than is here presented. Appellee was permitted by the District Court to ask this witness certain details of written contracts, of course picking out such details of the contracts as appellee thought helpful to its case and ignoring the other details, and the witness was allowed to testify what the contracts stipulated on these points. We cannot see how this can possibly fail to be reversible error. *Sebree v. Dorr, 9 Wheat. 558, 563.* The damage to appellant of having this testimony submitted to the jury as proper for them to consider, is obvious. Mr. McGowen squarely testified (Tr. 68 & 120), that the difference between the 3c paid to appellant and

the 4.832c which was the market price of the same gas, was the cost to the producer of the obligations in these written contracts about which he testified.

Proving the necessity for this rule that when written documents are available, oral testimony of their contents is inadmissible, Mr. McGowen's testimony of the contents of these documents is vitally incorrect. He says these contracts obligated the seller to maintain certain pressure. This is not true. He says these contracts required the seller to go out and buy more gas if their supply was insufficient. This is not true. How can it fail to be reversible error for the trial court to permit such a gross perversion of the elementary rules of evidence, when thereby untrue statements as to the vital contents of documents are put before the jury.

C.

What it cost the seller to do business under these pipe line contracts is irrelevant and immaterial. The sole issue in this case is what is the price in these sales. Presumably the seller named a price that would yield a profit, but whether this was true or not is immaterial.

Let us suppose an example. Suppose the issue before the Court was the retail market price of sugar in New Orleans. Suppose the undisputed evidence was that in all of the retail stores in New Orleans, sugar was sold for 5c per pound. Would there be any question but that 5c was the retail market price of sugar? Suppose a litigant tried to introduce additional evidence, to prove that it cost the stores considerable money to keep their stocks of sugar on hand and adequate, and to run their stores. Would anyone think this evidence disproved the previous evidence that 5c

was the price of sales. Obviously the court would rule that what it cost the retail stores to do business was not relevant, when the price at which they sold was in evidence.

So here, whether appellee had to incur expenses as testified by Mr. McGowen, is irrelevant. The relevant fact is that they sold at a certain price.

7.

A Gas Field Has Only One Market Price.

Possibly the most ingenious of opposing counsel's devices for confusing the record is the claim that there are two market prices, one at the wells in the gas field, and one in the field itself, and the land-owner is entitled only to the price at the well.

A mere glance at what a gas field really is, will dispell any such illusion.

A gas field consists of a limited area of land, thickly studded with wells. It is no more possible for there to be two market prices of gas in that limited area, than it would be for there to be two market prices for cotton in the City of New Orleans. The market price at each well must be the same as at every other well, and the market price at the well must be the same as in the field right next to the well. Assume for the sake of argument that wells are half a mile apart. There could not be a market price in that half mile different from that at the wells.

By oversight, no map of the Richland gas field was introduced in evidence in this case, but one will be found in the transcript of record now before the court in the case of *Union Producing Co. v. Driskell, No. 9499*, at page 378 of that transcript.

Looking at the matter also from the viewpoint of what was the intent of the parties to this lease: plainly lessor must have contemplated that any gas produced by his lessee or other producers would be sold in the field, and that he would receive 1/8 of such sales. It is unthinkable that lessor contemplated that some vague, indefinite sum would be deducted from than price by lessee for alleged transportation costs.

If any uncertainty existed on that point, it must be decided in favor of lessor, as an oil or gas lease is constructed strongly in favor of the lessor. *Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623.*

Also, this issue has been squarely decided by the Supreme Court of Louisiana. In *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561, 563*, that Court said:

> "There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term "market price" meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there should be paid."

In this case, the issue was whether the price in the field, or at a point far distant from the field, should be paid. The Court took it for granted that the price in the field and at the well were synonymous.

In the case of *Sartor v. United Carbon Co., 182 La. 287, 163 So. 103*, the same Court said:

> "This Court, in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well was synonymous with the market price at the field where the gas was produced."

The Supreme Court of Louisiana clearly saw how impossible it would be to have one price at the well and another in the field of which the well was a part.

Hence the District Court was in error in permitting any evidence as to delivery costs.

8.

Appellee's Evidence as to Gathering Lines.

If the Court were to permit appellee to deduct from the price it received from the pipe lines, the cost of transporting the gas from the well it would be incumbent on appellee to prove this cost with legal certainty, since the facts are peculiarly within its knowledge. This appellee completely failed to do in the case at bar. We feel that the District Court treated appellant very badly in this matter.

Appellee first offered in evidence testimony of its book-keeper, Mr. Taylor that it costs 1.834 cents per MCF to get gas from the well to the point of delivery to pipelines in the Richland gas field. (Tr. 72). He testified (Tr. 77) this was the cost from the well to the delivery point. Appellee produced the figures in a statement, marking it as cost of pipe line operation, and the District Court permitted this to be offered in evidence as defendant's exhibit No. 26 (Tr. 76, 313-319). On cross-examination it was shown that these statements were absolutely false and untrue. First it was shown that

these figures are not copied from appellee's books, but are mere guesses of the witness, as the books do not show what the cost of transportation is, separate from other costs (Tr. 77-78). Next it was shown that this statement contains many items besides the cost of carrying gas in the pipe line from the well to the delivery point, as is shown by Mr. Taylor's testimony (Tr. 77-79). Included is the entire cost of the measuring stations, the general supervision of the field, etc. Mr. Taylor admits (Tr. 78), that the heading in the statement: "Cost of Operating Pipe Lines," is incorrect. Yet, after we had proved by appellee's own witness that these figures were all wrong and the statements in them false and untrue, the District Court permitted this statement to be read to the jury (Tr. 79-81). All of this was of course over appellant's objections. To cap the climax, the District Judge, in the charge to the jury (Tr. 356), ordered them to deduct from the pipe line prices, if they reached to them, the cost of transportation, which could only mean this false and untrue statement, as there was no other evidence in the record on the subject.

9.

Gasoline.

Appellant's petition alleges (Tr. 15, 20), that the gas produced as sued on in this suit, contained gasoline, which was extracted and sold by appellee. Appellant therefor claimed royalty of ⅛ on the market price of this gasoline, or in the alternative, all the gasoline.

Appellee moved *"in limine" to strike these allegations* (Tr. 28), and the District Court struck out of Appellant's petition, all claims for gasoline (Tr. 43).

This seems clearly reversible error.

The lease contract sued on (Tr. 22) provides that appellee is allowed to take oil and gas from appellant's land. If this gasoline does not come under the head of oil and gas, appellee is entitled to none of it, and appellant should recover the full value of the gas. If this gasoline is part of the gas, appellee is entitled to it on paying appellant royalty of 1/8 of its market price. Under no theory could appellee, lessee, take this gasoline and pay lessor nothing.

But this question is squarely settled by the law and jurisprudence of Louisiana. *Act 252 of 1924, section 13 (Dart Sec. 4783)*, reads as follows: "Gas means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas."

In two cases, *Coyle v. La. Gas & Fuel Co., 175 La. 990, 144 So. 737* and *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561*, the Supreme Court of Louisiana has expressly held that under a lease like this, lessor is entitled to one-eighth of the market price of the gasoline extracted, less the costs of extraction.

In the face of the gross injustice of failing to give appellant, as lessor, anything for the gasoline produced from his land; the plain reading of the lease, and the express law and jurisprudence of Louisiana; how can it possibly be said that the District Court did not commit reversible error in denying to appellant the right to prove anything on this subject.

We earnestly suggest that appellant, and all other land-owners, are entitled either to this royalty, or to a clear, complete statement from the Court as to why the above argument is unsound or authorities not pertinent. This has never been done by the District Court.

CONCLUSION

The issues in this case are important, because a vast number of leases are being made in Louisiana now in which the royalty provision is the same as in the case at bar.

Clearly the Court should provide the simplest possible way to determine the market price of gas. We respectfully suggest that this must be solely and entirely by considering the sales of gas in the field where produced.

Taking the sales of gas produces a rule by which both parties come before the Court on terms of equality, because the land-owner can ascertain the sales as well as the expert gas or oil companies. Under the rules laid down by the District Court in this case, it is practically impossible for a land-owner to litigate with an expert gas or oil company.

For the errors pointed out above, we ask that the judgment of the District Court be reversed and a new trial granted.

Respectfully submitted,

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